Comptroller General
of the United States

Washington, D.C. 20548

# Decision

**Matter of:** Fidelity Technologies Corporation

**File:** B-276425

**Date:** May 30, 1997

Jacob B. Pompan, Esq., Pompan, Ruffner & Werfel, for the protester.
John A. Evans, Esq., Department of the Navy, for the agency.
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**DIGEST**

Protest is sustained where protester's proposal included an apparently erroneous small disadvantaged business certification, which caused protester's proposal not to be selected for award, and where agency, which conducted discussions with offerors, was on notice of the apparent error and failed to provide protester an opportunity to correct it.

**DECISION**

Fidelity Technologies Corporation protests the award of a contract by the Department of the Navy, Naval Air Warfare Center (NAWC), Orlando, Florida, to Lockheed Martin Aerospace Corporation under request for proposals (RFP) No. N61339-96-R-0029 for simulator operation and maintenance (COMS) at various naval facilities. The protester contends that it was improperly denied the award on the basis of a clerical error in its proposal concerning its status as a small disadvantaged business (SDB) concern which should have been apparent to the agency or, alternatively, put the agency on notice of a possible certification error, and that the agency failed to hold meaningful discussions with Fidelity because the agency failed to raise the certification anomaly.

We sustain the protest.

The RFP, issued on July 22, 1996, contemplated the award of a firm, fixed-priced contract for a base 2-month mobilization phase-in period (lot 1) and a 5-month COMS services period (lot 2) with options to continue the COMS services up to an additional 53 months. Award was to be made to the responsible offeror whose technically acceptable proposal offered the lowest reasonable and realistic price.

The RFP contained the clause at Defense Federal Acquisition Regulation Supplement (DFARS) § 252.219-7006, entitled "Notice of Evaluation Preference for Small Disadvantaged Business (SDB) Concerns," a clause which provides for a 10-percent price preference in favor of proposals submitted by SDB concerns.

For purposes of determining eligibility for the price evaluation preference, the RFP contained the standard "Small Disadvantaged Business Concern Representation" clause found in Federal Acquisition Regulation (FAR) § 52.219-1, which requires an offeror to represent its status as a small business. Specifically, the clause, in relevant part, contains the following required representations:

> "(b) Representations. (1) The offeror represents and certifies as part of its offer that it **is** ☐ a small business concern, ☐ **is not** a small business concern.
>
> "(2) (Complete only if offeror represented itself as a small business concern in block (b)(1) of this section.) The offeror represents as part of its offer that it ☐ **is**, ☐ **is not** a small disadvantaged business concern.
>
> "(3) (Complete only if offeror represented itself as a small business concern in block (b)(1) of this section.) The offeror represents as a part of its offer that ☐ it **is**, ☐ **is not** a women-owned small business concern."

The RFP also contained DFARS § 252.219-7000, "Small Disadvantaged Business Concern Representation," a clause which requires an offeror to indicate membership, if applicable, in any of a list of specified ethnic groups which are generally presumed to be socially and economically disadvantaged and which also calls for the offeror to represent its SDB status.

Six technically acceptable proposals, including Fidelity's, were received by the October 28, 1996, closing date. In Fidelity's proposal, it had marked the boxes under the FAR § 52.219-1 representations clause which indicated that it was not a small business and not an SDB, and, under the DFARS § 252.219-7000 clause, it had again certified that it was not an SDB. On the other hand, it also affirmatively executed paragraph (b) of the SDB representation clause by identifying its ownership as Subcontinent Asian American, and it had listed, under its past performance record, contracts which it was awarded as an SDB contractor. The agency conducted discussions with offerors, including with Fidelity, but did not raise the question of Fidelity's SDB status and the apparent inconsistencies in its SDB-related certifications during those discussions.

Fidelity, whose proposal price was $10,052,948, was treated as a large business and award was made to Lockheed Martin Aerospace Corporation on February 28, at a price of $9,510,760. Had Fidelity been treated as a qualified SDB, the applicable price preference would have caused Lockheed Martin's price to be evaluated as $10,461,836 and Fidelity's low technically acceptable offer would have been in line for award.

Upon notification of award, Fidelity contacted the Navy, alleging that it had incorrectly represented in its proposal that it was neither a small business nor an SDB. Fidelity stated that these certifications were errors and that it is, in fact, a certified SDB and therefore eligible for the 10-percent price preference. The agency responded that there was no reason for the agency to question Fidelity's representations and certifications in its review of proposals and that it had relied on Fidelity's submissions. Thereupon, Fidelity protested to our Office on March 7.

The protester argues that the inconsistencies in its certification coupled with certain relevant, collateral, and personal knowledge of the contracting officer should have made it apparent to the agency that Fidelity had made a clerical error in its proposal. Specifically, the protester argues that its representations under the FAR § 52.219-1 clause are inconsistent since Fidelity marked both that it was not a small business and not an SDB, while the clause stated that the paragraph related to a firm's SDB status should be completed only if the offeror presented itself as a small business. Since Fidelity did not represent itself as a small business, the block related to its status as an SDB should not have been completed. Fidelity argues that its representations at the DFARS § 252.219-7000 clause are also inconsistent since the firm represented that its qualifying SDB ownership is Subcontinent Asian American, yet it checked that it was not an SDB.

Fidelity argues that the contracting officer was on notice of the erroneous SDB certification for other reasons as well. Within the past performance section of its proposal, Fidelity specifically identified itself as an SDB 8(a) firm on a contract that had been awarded in October 1995 by the same contracting officer at NAWC who initially served as contracting officer under the solicitation here.[1] Fidelity alleges that this contracting officer had close, continuing and relevant contractual dealings with Fidelity since the 1995 award date. Specifically, the contracting officer executed eight contract modifications showing the Small Business Administration (SBA) as the contractor and Fidelity as the subcontractor; one modification was completed only 8 days before the contracting officer received Fidelity's proposal

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[1]Apparently, the person serving as contracting officer at the time this solicitation was issued, proposals submitted, and evaluations commenced was replaced with another contracting officer some time during the evaluations. The agency has identified the two contracting officers but has not indicated the specific replacement date.

under this RFP. Moreover, both before and after Fidelity submitted its proposal, the contracting officer discussed with a Fidelity representative the firm's status as an SDB and Fidelity's anticipated graduation from the 8(a) program in November 1997.

In addition, Fidelity's past performance record submitted with its proposal referenced two contracts awarded in 1994, with options extending to 1999, by the contracting officer who replaced the original contracting officer under the solicitation at issue. The protester also points out that the replacement contracting officer was personally involved in an 8(a) contract with the same Standard Industrial Classification (SIC) code as under the protested contract, which Fidelity was awarded on September 26, 1996. This award was made only 28 days before Fidelity submitted its proposal under the procurement at issue.

Finally, Fidelity points out that it requested a copy of the solicitation by letter dated March 11, 1996, and in this letter it specifically stated that it was an SDB, certified under the SBA's 8(a) program. The protester points out that this letter should have been in the agency's files for this procurement. Because the agency neither requested clarification of Fidelity's SDB status nor advised the offeror of the possible error in its certification during discussions, Fidelity argues that the award was improper because it was not afforded meaningful discussions.

The Navy's position is that FAR § 19.301(b) (FAC 90-45) directs the contracting officer to accept offerors' self-certifications and representations, and that Fidelity's certifications were not inconsistent, and thus did not provide any notice to the contracting officer of a possible error. The agency argues that Fidelity's representation at the FAR § 52.219-1(b)(2) clause, which is only required if an offeror represents itself as a small business--which Fidelity did not--is merely "surplusage" that is not inconsistent with its certification. The Navy also takes the position that the contracting officer is required to judge a proposal "within the four corners of the proposal," and, because only an offeror knows if it qualifies for a particular size standard at a particular time, there can be no constructive notice, as the protester contends, from previous contracts or, presumably, from the contracting officers' knowledge of the offeror. Because its view of the representations and past performance records did not suggest inconsistencies or mistakes, the Navy argues that it was not required to address Fidelity's representations in discussions. In this respect, the Navy takes the position that Fidelity's entries could reflect that it was a former SDB which recently became a large business.

As the Navy points out, FAR § 19.301(b) directs that contracting officers shall generally accept offerors' representations in their offers that they are small businesses, and we think that the Navy is correct in adopting the same approach to SDB representations. However, FAR § 19.301(b) carves out an exception where "the contracting officer has a reason to question the representation." Although there is thus generally no obligation on a contracting officer to question an offeror's representations about its small business or SDB status, we believe that, in the unique factual circumstances of this case, the contracting officer had reason to question the accuracy's of Fidelity's SDB certification and had an obligation to provide the protester an opportunity to correct the apparent error in that certification.

First, the proposal itself could have put the contracting officer on notice of a possible error in Fidelity's SDB representation. The protester's representations in its proposal were potentially inconsistent, reflecting both that its ownership is Subcontinent Asian American and that it is not an SDB concern.[2] Moreover, the past performance information included in Fidelity's proposal specifically referenced its status as an SDB.

Moreover, the protester has presented credible arguments that both contracting officers were aware of its SDB status and, to corroborate its position, Fidelity has provided us with an affidavit from a Fidelity representative stating that he discussed the firm's SDB status with one of the contracting officers immediately before and after submission of its proposal. The Navy has not denied the protester's position that its March 11 letter stating it was an SDB was in its possession and in the procurement file and has not filed any affidavits from either contracting officer to rebut Fidelity's statements concerning what the contracting officers knew or should have known concerning the protester's status. We therefore conclude that the contracting officer was on notice of the apparent error in Fidelity's SDB representation.

The Navy argues that it could only consider information within the four corners of that proposal. This argument is unpersuasive, both because the inconsistencies within the proposal itself put the contracting officer on notice of the apparent error and because an agency may take into account its knowledge in evaluating proposals and making an award. TRESP Assocs., Inc.; Advanced Data Concepts, Inc., B-258322.5; B-258322.6, Mar. 9, 1995, 96-1 CPD ¶ 8 at 6-7. Indeed, some information is simply too close at hand for the agency not to consider it. International Bus. Sys., Inc., B-275554, Mar. 3, 1997, 97-1 CPD ¶ 114 at 5.

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[2]The agency argues that in American Imaging Servs., B-242544, Apr. 29, 1991, 91-1 CPD ¶ 417 at 2, we found no inconsistency where a firm had a qualifying ownership yet miscertified that it was not an SDB, since a qualifying ownership alone did not assure a firm of SDB status. Here, however, as noted above, there are other indicia of an erroneous certification. Moreover, in American Imaging Servs., there was evidence that the protester acted deliberately, as opposed to erroneously, in certifying as a non-SDB firm. While the Navy here hypothesizes that Fidelity acted deliberately, there is no evidence in the record to support this allegation.

Here, the Navy made no attempt to resolve the protester's SDB status, even though it could have done so through the clarification process. See Jimmy's Appliance, 61 Comp. Gen. 444, 446 (1982), 82-1 CPD ¶ 542 at 2-4. Moreover, despite conducting discussions with the offerors, it did not mention the SDB status question in its discussions with Fidelity. Because discussions were held, we need not decide whether the agency would have been required to clarify Fidelity's SDB status if award had been made on the basis of initial proposals. When discussions are held, they are required to be meaningful. See Ashland Sales & Serv., Inc., B-255159, Feb. 14, 1994, 94-1 CPD ¶ 108 at 3. Here, this meant that the Navy had an obligation to raise the SDB status question in its discussions with Fidelity, in light of the inconsistencies within the firm's proposal, the significance of the 10-percent evaluation preference under the program whose purpose is to assist small disadvantaged firms, and the agency's apparent knowledge of the inaccuracy of the SBD representations in the proposal. See FAR § 15.610(c)(4) (FAC 90-44) (during discussions, contracting officer shall resolve any suspected mistakes by calling them to offeror's attention). Accordingly, we conclude that, because of the specific circumstances present in this instance, the agency acted improperly by not resolving the question of Fidelity's SDB status before award.

We recommend that the agency provide Fidelity the opportunity to correct the apparent error in its SDB certifications. If, as a result, Fidelity's proposal is selected for award, that award should be made and the contract with Lockheed Martin should be terminated for the convenience of the government. If the agency has any continuing doubt as to Fidelity's status after receipt of Fidelity's revised SDB certifications, it should refer the matter to the SBA. We also recommend that the protester be reimbursed its costs of filing and pursuing its protest, including reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1) (1997). The protester should submit its certified claim for costs to the contracting agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

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